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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

**Reference: Australian Security Intelligence Organisation Legislation Amendment
(Terrorism) Bill 2002**

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**SENATE
LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE**

Wednesday, 13 November 2002

Members: Senator Bolkus (*Chair*), Senator Payne (*Deputy Chair*), Senators Greig, Kirk, Scullion and Stephens

Participating members: Senators Abetz, Brandis, Brown, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Knowles, Lees, Lightfoot, Ludwig, Mason, McGauran, Murphy, Nettle, Sherry, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Bolkus, Kirk, Ludwig, Nettle, Payne, Scullion and Stephens

Terms of reference for the inquiry:

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters.

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Committee met at 3.22 p.m.

GLENN, Mr Richard Alexander, Acting Principal Legal Officer, Security Law and Justice Branch, Attorney-General's Department

HOLLAND, Mr Keith Colin, Assistant Secretary, Attorney-General's Department

MARSHALL Mr Steven, Legal Adviser, Australian Security Intelligence Organisation

RICHARDSON, Mr Dennis, Director-General of Security, Australian Security Intelligence organisation

CHAIR—Welcome. As we may run out of time with ASIO and A-Gs, it might be appropriate for us to give you some questions on notice at the end of today's hearings. We may also look to see whether officers are available to meet with us in Sydney on Tuesday the 26th. I just flag those as two possible alternatives to handle any problem we might have at the end of this afternoon's session.

There are some questions arising out of yesterday's discussion that we may want to go back to. But I would like to proceed with other areas at this stage and then come back to those issues if we have time. I would like particularly to move on to the issue of children. I gather the current state of the legislative proposal is such that children will only be subject to questioning if, in fact, they are suspected of terrorism offences as opposed to gathering information. Is that the case?

Mr Holland—That is correct.

CHAIR—In that case, what is the jurisdiction for extending this regime to children if the regime is not geared towards gathering information from children who are not suspects?

Mr Holland—The government took on board the concerns that have been expressed by both committees that had looked into this with respect to a regime that dealt with children. The fundamental focus of the legislation has not changed with respect to them. It is still with the intention of seeking intelligence that they might have with respect to offences. However, it was recognised that, given they were children, the threshold at which they would be asked to come in would be raised. So only if they were suspected of an offence or engaged in an offence would they be called in. Again, it would not be for the purpose of adducing evidence for a prosecution of them for offences; it would still be with the intention of getting the intelligence. As I mentioned yesterday, the decision to deprive someone of their freedom of movement is not one to be made easily and certainly with respect to children even more so. So this really was to set a higher threshold.

CHAIR—If they were suspects and you were to drag them in for questioning as to intelligence, isn't there a real possibility that you would be jeopardising any subsequent trial in respect of such children?

Mr Holland—I am not sure what you mean. In terms of any evidence that is adduced, again it could not be used against them; it really is for the collection of the intelligence.

CHAIR—But they are suspects. Let us approach it another way. What do you see then as being the inadequacies in current law in respect of children? Why is the current law for the questioning of juvenile suspects inadequate? What would you be trying to get that you cannot get under existing legislation?

Mr Holland—ASIO could not do it. That has been the point of this exercise from the very beginning—that ASIO cannot question these people for intelligence purposes, whether they are suspects or not. This would hold true also for children. It is not for law enforcement intelligence purposes; it is not for adducing law enforcement information; it is about intelligence gathering.

Mr Marshall—I think also, in the circumstances of proceeding under the Crimes Act provisions, the person detained would have a right to refuse to answer questions. That is, as we outlined yesterday, appropriate in circumstances where the object of the exercise is to facilitate the collection of evidence for the purposes of a prosecution whereas in this circumstance there would not be the right to silence and, as a result, the evidence provided during the interview could not be used against the person detained in a prosecution.

CHAIR—So it is more than just who does it; it is basically being able to avoid the implications of the right to silence under those provisions.

Mr Marshall—It is the objective of the exercise of obtaining a warrant ultimately, which is not for the purposes of facilitating a prosecution or a criminal investigation but for the purposes of collection of intelligence.

Senator KIRK—Just following on from that, say a child suspected of a terrorist offence was being interviewed by the AFP, could ASIO sit in on that interview and perhaps ask further questions in relation to intelligence matters at the same time? I just wonder why you need to have the two separate procedures.

Mr Marshall—We would have no legal right of compulsion under the AFP interview procedures. I am not aware of ASIO ever being cloaked with AFP authority for the purposes of interviews. It would be a completely different legal regime from what is being contemplated here.

CHAIR—Essentially you want the capacity to be able to prosecute for not providing information that they may know, and you want to be able to question them without them having the protection of the right to silence. Essentially, is that it? Also, are they entitled to legal representation or representation from a legal adviser?

Mr Glenn—Yes. Young people under a warrant would, in fact, be guaranteed access to an approved lawyer at all times.

CHAIR—But with no right to silence and no right to protection against self-incrimination?

Mr Marshall—They have a protection against self-incrimination, which is reflected in the government amendments proposed in the House to give effect to the recommendations of the PJC's advisory report.

Senator PAYNE—Is there any access to lawyers for children in private or is it the same as for other people being questioned?

Mr Glenn—No, that would be the same. The ability to discuss the matters with a lawyer would be governed by those provisions which apply to all people, regardless of age.

Senator PAYNE—So there is no consideration that children may have a special vulnerability in that way?

Mr Glenn—Children will also be entitled to have a parent, guardian or other representative available to them with whom they could discuss things in private but, as for lawyers, they would not be able to.

CHAIR—Could the parents or guardians or the lawyers be excluded for unduly disrupting questioning?

Mr Glenn—Yes, they could be. If they were, the prescribed authority would be obliged to suspend proceedings until a substitute parent, another parent or another guardian—or, indeed, another lawyer—could be made available.

CHAIR—Do you have any concept of what unduly disrupting questioning would be constituted by?

Mr Glenn—That would be a matter to be determined by the prescribed authority, but it could consist of constant interjections so that a question was never finished, for example. That could be one conceivable circumstance.

CHAIR—So we will not be able to gather intelligence from children who are not suspects? Is that right?

Mr Glenn—That is correct.

CHAIR—In respect of those who are suspects, they will have to go through a degree of double jeopardy—they might have to face the possibility of prosecution in respect of non-cooperation in providing intelligence but at the same time, being suspects, they would have to face the prospect of being charged down the road for some other offence.

Mr Glenn—They will not face the prospect of being charged for another offence on the basis of anything they say in the course of an interview under a warrant. That would still not be able to be adduced against them.

CHAIR—So not only anything they say but also anything that may be gleaned from what they say could be used against them?

Mr Glenn—Derivative use is available.

CHAIR—The age of 14 I think is considered by many in the community as being too young. How do you defend that sort of age?

Mr Glenn—The age of 14 corresponds to the age of criminal responsibility in Australia. Children can be charged with an offence and be considered to have sufficient maturity to know right from wrong and therefore be criminally culpable. There has been a level set in that context, and it was considered that it was an appropriate level that enabled a child to be questioned under a warrant.

CHAIR—Was any consideration given to an upper limit of detention being less than seven days for children?

Mr Glenn—No, that seven-day limit has been introduced as a result of a recommendation of the parliamentary joint committee. As we understood, the recommendation was expressed across the board.

CHAIR—And children will not be allowed to speak to their lawyers in private?

Mr Glenn—No.

CHAIR—Let us move on to legal representation.

Senator STEPHENS—I thought long and hard about the things we talked about yesterday and went back to submission No. 246, from the Canberra Islamic Centre. They raised the issue in their submission about the suspect's right to silence and the cultural issues involved with people who speak English as a second language and who may inadvertently or unknowingly confess to crimes that they have not committed or may not know the correct response when their rights as Australian citizens are made known to them. You provide interpreters. Could you comment on where they come from and how they are chosen?

Mr Richardson—They would be nationally accredited interpreters.

CHAIR—Paid for by?

Mr Richardson—Paid for by government.

CHAIR—It has been put to us that not having legal representation in the first 48 hours or so is in itself a problem which has been previously discussed—and will be, I suppose, in the future. But it also effectively nullifies the right to seek judicial review before a Federal Court. That is a pretty strong contention, isn't it, Mr Holland, that by not having full access to legal representation in the first 48 hours a person may significantly be denied access to avenues such as habeas corpus or judicial review remedies, which only an effective competent lawyer would know about?

Mr Holland—I think, as we mentioned yesterday, the role of the prescribed authority at the very beginning of these proceedings is to set out for the person before the prescribed authority everything that they need to know—what their responsibilities are and what the consequences of their actions are—but, most importantly to point out at the very beginning that they have the right to have access to the Federal Court. If the person at that stage indicates that they want to do that, then there is power within the prescribed authority to direct that steps be taken to allow that to happen. It would be no different, for example, from an individual saying, 'Yes, I do want to make a complaint to the Inspector-General of Intelligence and Security or a complaint to the

Ombudsman.’ Then the prescribed authority says that the steps have to be taken immediately there and then for the person to be able to make that complaint orally if necessary, because obviously under normal circumstances it is in writing and they would lose time. So, while the lawyer is not there, they will be made aware of their rights and they will be given the opportunity to exercise those rights.

CHAIR—On previous performance they would possibly have been woken up at five o’clock in the morning, confronted with machine guns and sledgehammers and dragged before an authority. They would not be in a real position to have a real understanding of the legal system. More often than not, they probably would not know the language. Do you think that there is a bit of a power imbalance there?

Mr Holland—Given that the role of a prescribed authority is to ensure that the individual is not put in that position, the prescribed authority is not there as part of the interviewing system. The prescribed authority is there as an impartial observer and to intervene where the prescribed authority thinks that it is necessary to protect the rights or the interests of the individual.

CHAIR—The prescribed authority is not going to interrupt proceedings and say, ‘I should warn you that you might have a right to go to the Federal Court in respect of this; or I should warn you that you have a right to seek habeas corpus after a few hours.’ That person is not going to have that as a responsibility, are they?

Mr Holland—They have the responsibility to tell them that they have the right of access to the court in the very beginning and then they must repeat that warning once in every 24-hour period following the initial notice to the person that they can exercise that right.

CHAIR—It might be very hard for us around this table to put ourselves in the position of someone who is appearing before a prescribed authority but I would imagine that their understanding of their rights to process would be absolutely nothing like what you are anticipating now.

Mr Richardson—Could I also put on the record, as I mentioned yesterday, that the only enter and searches in which guns were used and where there was forced entry were premises on which it was believed there were weapons present. The entry and search operations that were conducted two weeks ago were not conducted with machineguns or sledgehammers. I would like to put on the record also that, in each of the enter and searches, linguists were there so that there could be proper communication.

CHAIR—I saw a lot of footage from those events of a few weeks ago, and there seemed to be a lot of damage done to at least one premises.

Mr Richardson—To at least one premises; that is right.

CHAIR—Why was that necessary?

Mr Richardson—As I mentioned yesterday, the only premises in which there was forced entry was where it was believed there were weapons present on the premises. Each state police has their protocols for entering premises in which it is believed weapons are present, the safety of the people entering the premises being a factor.

CHAIR—It also seemed curious to me that someone walked out with a computer monitor. Do we expect to find something in a monitor?

Mr Richardson—Yes, you could.

CHAIR—Like what?

Mr Richardson—If you are searching a premises, you do not assume where people may or may not put material. It is possible to hide things in lots of things. It was perfectly sensible and perfectly reasonable to take out computer monitors. If they had not done so, they would not have been doing their job.

Senator PAYNE—This is probably a question for Mr Holland. Having read the provisions a couple of times, I am confused about the dual use of the words ‘approved lawyer’ and ‘legal adviser’. I understand ‘approved lawyer’; it is clearly defined and requires a security clearance, five years practise and so on. But what is a ‘legal adviser’?

Mr Glenn—In a sense, a legal adviser is a lawyer who is not an approved lawyer who may be available to a person who either is subject to a warrant that does not require detention, for example, or is subject to a warrant that requires detention but also enables the person to have access to a lawyer of their choice. There is nothing preventing—

Senator PAYNE—But a legal adviser cannot be present during questioning. Only an approved lawyer can be present during questioning of a minor, for example.

Mr Glenn—A legal adviser could be present if the warrant allowed for it.

Senator PAYNE—I see.

Mr Glenn—You could have a range of warrants, starting with simply a warrant to attend and answer questions, or a warrant requiring detention but giving access to a lawyer of the person’s choice or a warrant requiring detention and only providing access to an approved lawyer. So it can run in a continuum.

Senator PAYNE—The full gamut?

Mr Glenn—Yes.

Senator PAYNE—But that does not detract from the fact that ‘legal adviser’ is not defined, although the reference at 34U says ‘contacts another person as a legal adviser’ without any specificity at all. Does that person have to be an admitted legal practitioner?

Mr Glenn—Yes. We would suggest that ‘legal adviser’ would take its ordinary English meaning, which would suggest it is a legal practitioner who is accredited to practise the profession wherever they happen to be.

Senator PAYNE—I am not sure that is clear on the face of the bill. In fact, I am sure it is not clear on the face of the bill.

Mr Holland—We will take that on notice.

CHAIR—Thank you for taking that on notice, because it is one of the points we will focus on.

Senator KIRK—I have a question following on from the chair's questioning in relation to persons who are detained for that 48-hour-period without legal representation.

CHAIR—The bells are now ringing for a division in the Senate.

Senator PAYNE—Mr Chair, I am not sure if you had an opportunity to make it clear, but I suspect this afternoon is not going to lend itself to easy process for a range of reasons. The consideration of the stem cell legislation leads to that.

CHAIR—We will be back soon.

Proceedings suspended from 3.44 p.m. to 3.48 p.m.

Senator KIRK—My question concerns those who are held for the 48-hour period. As you have just told us, they would be advised by the prescribed authority of their various legal rights and the like. How is a person meant to come to the conclusion that they may be in a position to apply to the Federal Court or for some other remedy when they do not have the benefit of any legal advice about that? In such a case, would it not be prudent for the person just to say, 'I wish to make an application to the Federal Court'? What happens at that point? Is questioning suspended? Is there an automatic right to apply? Also, how do they actually go about formulating their application? Is it then that a lawyer can be brought in to assist them with the preparation of that application? I am uncertain as to the process; perhaps you can fill us in on it.

Mr Glenn—With respect to the first part of your question, the prescribed authority would provide information about the ability to go to the court and, indeed, in a broad sense, perhaps the types of applications that could be made.

CHAIR—Where is the guarantee of that in the legislation?

Mr Glenn—It is in the list of things that the prescribed authority must say to the person on first appearance. The person may then say, 'I would like to apply to the Federal Court for a remedy,' and that may be allowed by the prescribed authority. To some extent, that would be at the discretion of the prescribed authority but it would also be in accordance with the terms of the warrant, which may describe the extent to which the person could—

Senator KIRK—Why is that at the discretion of the prescribed authority? If a person has a legal right to apply, can't they press that right? It is not really for the prescribed authority to say yes or no, is it?

Mr Glenn—The warrant may determine the extent to which the person may contact people outside of the context of the questioning.

Senator KIRK—Including the court?

Mr Glenn—Including the court.

Senator KIRK—Including making applications for judicial review. Is that what you are saying?

Mr Glenn—Including the court, yes.

Senator KIRK—So some people may have their rights to judicial review limited, you are saying, by the terms of the warrant?

Mr Glenn—That would be a matter for the prescribed authority then to determine whether a direction should be made to allow the person to make the application.

CHAIR—The questioning goes to the terms of the warrant, and you said that the right might be limited pursuant to the warrant. Is it then up to the authority that is overseeing the examination?

Mr Glenn—The prescribed authority can make directions. There is a limitation on a direction that is directly contrary to something in a warrant that could only be done with the approval of the minister. So the prescribed authority would be obliged to contact the Attorney-General in seeking his consent to make that direction.

Senator KIRK—I am just trying to get this clear. You appear to be saying that in some circumstances it might be the case that, even though people would appear to have legal rights that they could exercise, those legal rights might be limited by the terms of a warrant. If so, it would not be true to say that everybody who is being questioned under a warrant has a legal right to apply to the Federal Court for judicial review—only some.

Mr Glenn—It would be a true statement to say that the warrant could limit the ability of a person to contact others, and that could include making an application to the Federal Court.

Senator STEPHENS—Who prepares the warrant and determines the range of constraints that might be within it?

Mr Glenn—The application for the warrant would be prepared by the Director-General of Security. But the warrant would then need to be approved by the Attorney-General, and either a federal judge or a federal magistrate would go through a range of bodies in the approval process to determine exactly the extent of the powers under the warrant. That would have to be based on evidence that suggests that the particular powers are necessary—that is, that the person should be detained or should not be detained et cetera.

Senator STEPHENS—Or that the person should not be able to have access to legal recourse?

Mr Glenn—Indeed. The Attorney-General could make a decision in the approval process that the person have their access to an approved lawyer delayed for 48 hours, for example, on particular grounds.

Senator STEPHENS—Perhaps this is a question for you, Mr Richardson. In terms of preparing the warrant, if you were to determine that the particular person you were looking to detain should not have the right of access to the Federal Court, would that be contained in your warrant as part of the conditions?

Mr Marshall—In practice, a request would be put forward to the Attorney-General for a warrant with certain conditions being expressed on the draft warrant for the Attorney's endorsement prior to it going to the prescribed authority. In clause 34C of the legislation, headed 'Requesting warrants', the normal provision is that the warrant must permit:

... the person to contact an approved lawyer at any time when the person is in custody or detention ... in connection with the warrant.

That is then subject to the exception in subsection (3C), where the minister would need to be satisfied:

... on reasonable grounds that:

(a) the person is 18 or older; and

(b) it is likely that a terrorism offence is being committed, or is about to be committed, and may have serious consequences; and

(c) it is appropriate in all the circumstances that the person not be permitted to contact a legal adviser ...

Senator STEPHENS—All three conditions need to be met?

Mr Marshall—Yes, that is correct. There are further conditions but they are the key ones.

Senator STEPHENS—Thank you.

CHAIR—Have you taken advice as to what would happen if someone were dragged in and, after a short period, they said, 'I want to go to the Federal Court and I don't want to answer any more questions until I can do that.' What is your position then in terms of continued questioning?

Mr Richardson—Ultimately, I believe it would be determined by the prescribed authority.

CHAIR—Sure. But if that person insisted, despite what the prescribed authority said?

Mr Richardson—Again, I would take legal advice on that but I believe they would be in breach of the requirement to cooperate in the answering of questions.

CHAIR—By trying to exercise their constitutional right to writs of habeas corpus, for instance?

Mr Richardson—If this bill becomes law then there would be a legal framework there. If they refused to cooperate in the answering of questions in that 48-hour period then, depending upon the legal advice, they could be in breach of their legal requirements.

CHAIR—Have you taken advice as to whether it is constitutional to fetter the right of access to the prerogative writs?

Mr Holland—As I mentioned yesterday, obviously we have worked closely with the Office of Parliamentary Counsel—

CHAIR—Mr Holland, I know what you are about to say and it is very frustrating for us. We are trying to work out whether there is a constitutional basis and your telling us, ‘Trust us, everything is all right,’ really does not satisfy my interest in this, nor any other person with a full and engaged interest in it. In fact, it should not satisfy the public. We actually want to know whether you have taken advice and we would like to see that advice. If you say that you have taken advice and that it is right, I would like an explanation of that.

Mr Holland—The advice that was given related to the entire bill. In terms of taking that particular provision and getting advice on it separately, then the answer is no. In answer to your question as to what would happen in that situation, certainly it is open to the prescribed authority to contact the Attorney-General and say, ‘I know that the warrant on its face says that this person is not allowed to have contact with anyone and not allowed to have contact with a lawyer but I am advising you that this person has said that they will not do anything until such time as they can exercise their right to go to the Federal Court.’ That would then put the ball back into the Attorney’s court and the organisation’s court as to what would be the benefit of getting any information in those circumstances. I would see it as being a practical problem, given those circumstances that you have set out.

CHAIR—I think you have got more than a practical problem; I think you may have a constitutional problem and you may even have a problem in terms of any subsequent prosecution if a person is fettered from exercising both constitutional and other legal rights. Have you considered that?

Mr Holland—No, Senator, I have not.

CHAIR—You may not have, but obviously other people in the department have been working on this legislation.

Mr Holland—I do not know that they considered the specific point that you have raised. I cannot say that they have and I cannot say that they have not. Any advice that would have been given would have been on the bill as a whole. I am not aware of whether or not that specific issue was raised.

CHAIR—We raised a few points yesterday going to the constitutional soundness or otherwise of the legislation, and you said that you had been advised that there was no problem. But we can infer from what you are saying now that you really might not have sought advice on those specific points we raised yesterday.

Mr Holland—No, that is not what I am saying. I am saying that I am not aware that advice was sought on this problem that has currently been raised—if it is a problem. It has just been raised; I have not had a chance to look at it personally and I would not like to make a decision off the top of my head right now. I do not think that would assist the committee. In terms of advice on the other issues that were raised in yesterday’s discussions, yes, some advice was

sought. I am not able to provide that written advice. It is possible that I might be able to assist the committee in another way that we are exploring and I would seek the committee's indulgence to allow some time to be able to do that.

CHAIR—What we might do is keep going through this afternoon's proceedings and then signal subsequent opportunities to get together. I will move on to another part. It has been put to us that there is no specificity as to the right of continuous presence, even though the bill provides for contact with lawyers. Is that your understanding of the bill?

Mr Glenn—The right is to have contact with an approved lawyer and we would suggest that the extent of that contact would be determined by the wishes of the detained person. If they wish to have the continuous presence of a lawyer, and that is the way they want to have their contact, then that would need to be provided for them. If they wish to make telephone contact with a lawyer, simply to speak to them on a one-off basis, that would also be provided for them.

CHAIR—Could you check that for us? It has been put to us that another authority or some other factor may intervene between the expression or the will of the detained person and their rights to continuous legal presence. Proposed section 34AA provides a selection process for approved lawyers. It says that approval would be based on:

- (i) a security assessment ... ; and
- (ii) any other material that the Minister considers is relevant to the question whether to approve the practitioner.

It is a bit broad, isn't it?

Mr Glenn—That provides the Attorney with the ability to make an assessment about the particular individual, including where they may live, whether they are in an area that has a surplus of people who have requested to be approved lawyers—a range of issues like that. It does have some breadth for administrative purposes.

CHAIR—Administrative purposes is one thing but, on this basis, the minister could bar someone because they might belong to a political party, for instance. It is very much up to the minister to determine and whatever criteria the minister may use is not reviewable. Could you not wind it back a bit?

Mr Glenn—That suggestion is correct.

Mr Holland—I will take that on notice.

Senator PAYNE—While we are discussing the question of clearing lawyers, one of the submissions that I referred to yesterday, which is from my colleagues in the opposition, suggests that, in the alternative model, people being questioned should have the right to have a lawyer of their own choice present during questioning. In the circumstances where the magistrate or judge issuing the warrant is satisfied that the individual might be a security risk or the circumstances are so urgent that waiting for that person might prejudice public safety 'they may allow a lawyer to be chosen from a panel of lawyers nominated by law councils and security cleared in accordance with established security vetting procedures'. I know that this has been discussed in

other submissions, and back and forth, but is there a practical perspective on that suggestion from the department or ASIO?

Mr Holland—The practical problem that might arise is that you are putting the responsibility of determining whether or not an individual is a security risk on the judge who is issuing the warrant. At the moment, the responsibility to determine that is with the Attorney-General. I think it could be argued that it is unlikely the judge would be in a position to draw upon experience or expertise to judge the nature of the submissions being put by ASIO as to whether or not they are a security risk or a security threat. The Attorney-General—being a member of the National Security Committee of cabinet and one who receives briefings in relation to security and signs ASIO's warrants—would, I suggest, be in a better position to make that determination. I would suspect that the other practical problem is that, in nine out of 10 cases, the nature of the application was so quick that they would probably decide, 'We'll go for the latter arm of that rather than the former arm of that.' They are arguments that I think could be put. In terms of what is being asked here, I think the responsibility should lie with the Attorney-General to take that responsibility, that decision.

Senator PAYNE—So not with the prescribed authority, the magistrate or the judge?

Mr Holland—With the issuing authority, no.

Senator PAYNE—Thank you.

CHAIR—It is not really a practical problem; it is more like, 'Trust us. We know best.' Your potential problem is someone else's safeguard, isn't it, Mr Holland?

Mr Holland—I would not say that it is a problem. I think it is a question of: who is in the best position to determine whether or not what is being put to them is in fact the case? All I am suggesting is that the Attorney-General, because of his experience and his expertise in the area, would be in a better position to be able to judge what is being put to them by ASIO than would a judge who may be called on very rarely and, apart from that, would have no knowledge, experience or background in security matters. I do not know whether Mr Richardson wants to add to that.

Mr Richardson—No.

CHAIR—We do trust judges with security matters in other aspects of government policy and jurisdictions, don't we?

Mr Holland—We do, but as the committee and others have pointed out, what we are talking about here is a regime which is quite outside our normal regime. Given it is a regime that raises serious questions about people's rights and those rights that might be deprived from them, it is arguable that the responsibility for that at the end of the day should rest with the person who is responsible with the knowledge of the area and is responsible to the parliament in one sense as opposed to a judge. But I do not deny—

CHAIR—If ASIO did have a particular problem in respect of a particular legal practitioner, wouldn't the judge be the best person to make an assessment as to the validity of that problem?

Mr Marshall—I think there is a further practical difference here between the proposal as read out by Senator Payne and what is in the bill at the moment.

CHAIR—Can we answer that question first before you go on to another one?

Mr Marshall—Sure.

CHAIR—The question was: if ASIO did have a problem with a particular practitioner and did have some intelligence or evidence about that person being a security risk for these circumstances, isn't justice best served by an independent legal officer like a judge making an assessment based on that evidence? Why give the right essentially to ASIO and their minister?

Mr Holland—As I said before, in terms of security matters, the Attorney-General would be in a better position than the judge. It is not that the judge is being asked to judge this person on the basis of their personal knowledge of the individual. It is the judge who would be asked to—as the Attorney would be asked to—make the judgment based upon the evidence put before them by ASIO. As most of that would go to intelligence and security matters, I am suggesting that the Attorney would be in a better position to make the call on that.

CHAIR—When you are saying 'on the basis of intelligence as to that person', are you talking about the lawyer or the witness?

Mr Holland—No, we are talking about the lawyer now, aren't we?

CHAIR—Yes.

Mr Marshall—Although—

CHAIR—You have another point, Mr Marshall.

Mr Marshall—My point was that the proposal as reflected in the legislation is framed to refer to whether or not there are risks in having the person contact other than an approved lawyer. It is not framed with reference to whether or not, at the time a request for a warrant is made, ASIO should make a decision on all or any lawyers that person might wish to contact. The practical problem that I was referring to is that, if one presents before a Federal Court judge in the context of that judge issuing the warrant, at that time it might not be clear which particular lawyer the person wishes to have present during the proceedings. So the proposal in the bill as it stands is to provide that, in circumstances where the minister is satisfied that access to other than a non-approved lawyer would be inappropriate, perhaps because of the nature of the material that will arise in questioning, the person will have access to one person drawn from a pool of lawyers—whereas the proposal as previously read out is one which basically would require the Federal Court judge or magistrate to make a decision at the time of issuing as to the security status of a particular individual, the identity of whom may not be known at that point.

CHAIR—So is it hard to go back? Interlocutory proceedings take you 15 minutes, and there is possibly a phone call. What is the problem?

Mr Marshall—Normally, security assessments take a bit longer than 15 minutes.

CHAIR—If you have a problem with the person being proposed. But if you have not—

Mr Marshall—I would just say that normally security assessments take considerably longer than 15 minutes.

CHAIR—Your security assessment may, but the hearing before a judge, if it eventuates, whether it is up-front or 48 hours later, could be a very quick hearing or it could be a long one, but there is only 48 hours difference between the process under your proposal and the process that is being discussed by Senator Payne. It is not really a big inconvenience, is it?

Mr Marshall—I would just make the point that it is a different framework. The framework under the proposal as read out is making an urgent determination as to the suitability of a particular person on the spot as to whether or not they might be a security risk. The proposal as reflected in part (b) of the text read out by Senator Payne, and which is closer to what is in the bill, is where you have a panel of lawyers cleared in advance.

CHAIR—What happens with a parent lawyer? What are their rights?

Mr Marshall—A lawyer who is—

CHAIR—A parent of the witness.

Mr Marshall—Who is also a lawyer?

CHAIR—That happens quite often.

Mr Marshall—Do you mean in cases of persons under 18?

CHAIR—Under 18 or even over.

Mr Marshall—If the person being detained was over 18 and sought to argue that they should have their approved lawyer on the basis that that person was their parent, I do not think the legislation would provide any additional assistance to them. With respect to persons under the age of 18, I think the normal provisions providing for access to parents would apply.

CHAIR—You think; are you sure?

Mr Marshall—It is the first time I have been confronted with that question.

CHAIR—You could take that on notice. Going back to the earlier point about the minister's broad discretion, have you considered having criteria set out in either statutes or disallowable instruments to actually accommodate some of the concerns that people might have as to the breadth of this discretion?

Mr Holland—The discretion to?

CHAIR—To bar someone.

Mr Glenn—To delay access to a lawyer or to an approved lawyer?

Mr Holland—I am sorry; I am a little unclear.

CHAIR—This discretion that we referred to earlier that, under section 34AA, the minister may base his assessment on:

... any other material that the Minister considers is relevant to the question whether to approve the practitioner.

The bells are ringing again, so can you think about that and we will be back in a few minutes.

Proceedings suspended from 4.13 p.m. to 4.24 p.m.

CHAIR—We may just try and finish off legal representation at this stage. We were in the middle of you trying to understand what I was asking you.

Mr Holland—I have worked it out, you will be pleased to know. The question is whether or not we gave any consideration to spelling out in the legislation what any other material might be there in 34AA2(c). The answer is no, because it could be limiting to do that and so one possibility could be to say ‘including’. I do not think that that would get around the problem that you raised—that an attorney, if he was so inclined, could knock somebody back because of the political party that they were a member of—but I understand that that would be reviewable in any sense. I am not sure that any attorney would be prepared to make that decision.

The sorts of issues that we were talking about included the question of how many people might have applied to be in that pool from a specific area. It is similar to the problem that you face when it comes to marriage celebrants. You might have a whole bunch of people in one area and nobody in another area and you might have more than you need in that area. So that might be a relevant factor in deciding whether or not a person should be approved. This is bearing in mind that this is all a voluntary process in the sense that people put their hands up and say they want to be members of this group.

I take your point that we could expand on it by simply saying ‘including’ the other matters when you talk about the other matters that might be taken into account, but I am not sure that that solves the problem that you are concerned about.

CHAIR—It probably does not, but we will digest your answer. I indicate that we have to move on at 4.30. But what we will do is come back at two follow-up times. One is on Monday morning at 9.30, if that suits the witnesses. Witnesses should anticipate being asked to come to Sydney on the 26th. I suppose that gives you about a week or so to come back with answers to questions on notice that have been raised during the last day or so. Also, after this evening, I will try and get you as many questions on notice following up some of the answers that have been given so far. Obviously, after Monday there will be more questions on notice as well. So we will do a wrap-up in Sydney on the 26th. Before we finish off with you this afternoon, if it comes to legal representation first, are there any other questions on legal representation?

Senator STEPHENS—I have one question in relation to proposed section 34D and the warrants for questioning. The proposed subdivision here says that the person should immediately be taken into custody and that the warrant must:

- (ii) permit the person to contact identified persons at specified times when the person is in custody or detention ...

Is there a definition about who identified persons are?

Mr Glenn—No. An identified person would be a person identified in the warrant, either presumably by name or possibly by class—if you are talking about a parent, for example.

Senator STEPHENS—Thank you.

Senator KIRK—I have another question in relation to section 34AA. You were talking before about security assessments and I think it was Mr Marshall who said that security assessments take some time. How long do these security assessments generally take, or does it depend on the individual? Approximately how long does it take?

Mr Richardson—It depends what sort of check you are doing. If you are doing an electronic check, that could be a matter of minutes. If you are doing more substantive checks, it can take longer. Sometimes it depends on the information that people will be accessing. So I am not in a position to give a set time. Clearly, in a situation as envisaged in the legislation, I think it is fair to say that there would be a pressure in terms of time and I believe the organisation would in any instance be balancing off time factors in terms of the time critically of the issue being examined against the length of time it might take to clear someone.

Senator KIRK—Given that a person will be held for a certain period of time, would the security assessment for the lawyer concerned be taken up as part of the time of detention, or will this occur prior to the detention period?

Mr Marshall—The security assessment process, as laid out in the bill, is intended for the purpose of establishing a panel or pool of individuals who might be drawn upon in circumstances where the Attorney has determined that access should be to an approved lawyer because of the circumstances of the warrant. It is not envisaged that there be a detention period, that the person would then say, 'I would like this lawyer,' and that we would then go and conduct checks to establish whether that person should have access to the sort of material that might be disclosed in the proceedings before the prescribed authority.

Senator KIRK—You say that, in those circumstances, you would take the time to set up the panel of approved lawyers?

Mr Marshall—Yes. The intention behind that particular framework is to have a panel of lawyers available in advance. That is why Mr Holland has referred to the need to bear in mind other material relevant to the person being an approved lawyer, such as the need for a given number of lawyers in a given jurisdiction.

Senator KIRK—I have questions about that too. How many lawyers would you have in any given jurisdiction at any one time? Also, how far in advance would these lawyers be selected and put on the panel, as such?

Mr Marshall—That is not something which has been conclusively determined. It will, in part, obviously depend upon the need for recourse to this procedure. It may also depend upon the number of lawyers who are prepared, in accordance with the legislation, to consent to being

approved lawyers. It may also depend upon the number that might have been cleared in previous capacities. For example, a number of lawyers appear both for the Commonwealth and for individuals who do have security clearances at the moment.

Senator KIRK—How many lawyers in, say, each of the major capital cities would have those security clearances at present?

Mr Richardson—Very few.

Senator KIRK—Who do they tend to be? Do they tend to be Commonwealth lawyers, as I think you suggested, and not lawyers in private practice?

Mr Richardson—I think it is envisaged that in this regime they would be lawyers in private practice. Is that so?

Mr Marshall—Yes, because they will be acting on behalf of a client. There are some lawyers who have appeared in proceedings involving Commonwealth legislation, royal commissions and other proceedings who have had to undergo the clearance processes because of the nature of the evidence being examined and who have got those clearances, but I do not have any details on numbers.

Mr Richardson—But, relative to the size of the legal profession, it would be a very small percentage.

Mr Holland—But I think, Senator, you are trying to ascertain whether the lawyers who currently are cleared are private practice lawyers or Commonwealth practising lawyers.

Senator KIRK—Yes, that was part of my question.

Mr Holland—A number of Commonwealth practising lawyers are cleared. But, in answer to the question: yes, they are private practitioners, because they are called upon for one reason or another to appear in cases where there is a need for security clearance.

Senator KIRK—How long does that security clearance last? Is there an ongoing review of security issues?

Mr Richardson—A security clearance is normally valid for no more than five years—and that includes my own. I am required to be revalidated every five years. Every person in ASIO is required to be security cleared every five years. So it would be no more than five years.

CHAIR—At this stage, in closing this part of the proceedings, I will put a number of questions on notice. You may have answered them partially so far but we ask that you come back to us with full answers. What is the difference between a legal adviser and an approved lawyer under clause 34U? Please answer that as a general question and also in respect of the right to appear initially and the liability to be removed. Secondly, who can be a legal adviser, a layperson or a parent; and could you respond to that question by going to the proposed law? Before we close off, Senator Payne has a question for you.

Senator PAYNE—Before we proceed with other witnesses, I would like to get a response from the department. The PJC recommended the implementation of a sunset clause in the legislation of around three years, I think. I believe that the parliament and the community view this as very serious legislation to address very serious issues and that, if we have a sunset clause, government is required to say why it should stay in operation or not, as the case may be. Does the amended bill have a sunset clause?

Mr Glenn—No, it does not.

Senator PAYNE—What is the purpose behind not supporting that particular recommendation?

Mr Glenn—I think the view has been taken that the security environment has changed, and it has changed forever. It is unlikely that it can be said that the need for this legislation would run out after three years and, as a result, it should remain in force. As an alternative provision, included in the bill is a review by the parliamentary joint committee after three years to look at the implementation and effectiveness of the legislation. That then enables it to stay on the books without being subject to some arbitrary time limits of automatic termination.

Mr Holland—Chair, you asked a question yesterday about the number of judges who issued TI warrants. I have provided that to the secretariat for the committee's benefit.

CHAIR—Thank you. Senator Stephens also has a question.

Senator STEPHENS—I would like to put a question on notice, if I could, please. Last night I read again Professor Williams submission—that is submission No. 22—in which he refers to the guidelines on human rights in the fight against terrorism, developed by the Committee of Ministers of the Council of Europe. On page 22, he talks about the establishment of a hierarchy of rights. Have you considered a hierarchy of rights and how it would relate to the development of warrants and specific limitations put in them as to people's rights, for example, to legal recourse? Could you take that question on notice?

Mr Holland—Yes, we are happy to take that on notice.

CHAIR—Once again, I thank the officers of both ASIO and A-G's for their cooperation and assistance. We look forward to seeing you again on Monday morning.

[4.38 p.m.]

WILLIAMS, Professor George John (Private capacity)

CHAIR—I welcome Professor George Williams from the Gilbert and Tobin Centre of Public Law at the University of New South Wales. You have lodged submission No. 22 with the committee. Do you wish to make any amendments or alterations to that submission?

Prof. Williams—No.

CHAIR—I invite you to make a short opening statement, after which we will address questions to you.

Prof. Williams—First, I thank the committee for this opportunity to speak to these issues in what is obviously and necessarily a very compressed time frame. My starting point is that we do need new laws to deal with terrorism in Australia. Our existing legal structure is inadequate. Prior to September 11, anti-terrorism laws could only be found in the Northern Territory—and I think that is the correct starting point.

On the other hand, I think two things need to be kept in mind in addressing these issues. The first is not to overstate what sort of effect the law can have in any fight against terrorism and also to keep in mind that it is possible to overstate the significance of law and at the same time perhaps create more problems than may have been there in the first place. The other point is the obvious one: in dealing with new laws in this area, there has got to be a balance. National security is not an interest that trumps every other interest—that you put it on a set of scales and it simply weighs down everything to the extent that nothing else can be weighed against it. There has to be a balance such that we are not undermining the very democratic system that we are seeking to protect from terrorism.

I do not want to go through my submission in any detail. I will just focus on a couple of points out of the submission that I have tried to think about a bit differently in light of my attempts to watch the committee's web broadcast yesterday to get a sense of the issues. I did that because, in the absence of a submission from ASIO or Attorney-General's, it is obviously difficult to know exactly what the issues are. I would like to say this: my primary objection to the legislation in its current form remains that we should not legislate for the detention in secret without trial of citizens where those citizens are not suspected of any criminal offence. The response appears to be, from the submissions put to this committee so far, that that can be justified because there are adequate safeguards in the legislation. That seems to be the primary response, and I would like to deal with that by saying two things.

The first is that I do not think the safeguards are adequate. You can point to the fact that children are covered by this legislation from age 14. I think that is of serious concern, and we have to ask: what position would a 14-year-old girl or boy be in if put in this type of scenario? It is entirely inappropriate that these types of laws apply to any children. The second is that there is no sunset clause. If you look at any of the international instruments, including the Council of Europe guidelines, they all consistently take the view that legislation such as this can be justified where it is a temporary measure to strictly address an emergency facing the nation. The

temporary is always there, and it has got to be strictly tailored to the problem facing Australia. It may well be that it is correct to say that the current situation will be with us for a long time. My response is: let us have a sunset clause and let us re-enact the legislation at regular intervals but make sure there is an opportunity, when the time is right, for the legislation not to be renewed. Without a sunset clause, it simply becomes a permanent feature of our law enforcement landscape. The reality is that, with no sunset clause, it is unlikely ever to be repealed. You can point to a number of laws going back to even the 1920s and 1930s dealing with unlawful associations which simply have remained on the books long after any reason for them being passed has been removed.

The third reason I think we really do not have adequate safeguards relates to a range of process issues, inadequate definitions, perhaps gaps in the legislation and the fact that it is not clear how the legislation will operate in some areas. I have particular concerns about the role of lawyers under this legislation—not only that you may not have access to a lawyer for a particular time, but also that, even when you do have access to a lawyer, your conversation must be listened to by a responsible ASIO officer. I am not aware of any other legislation where having a discussion with your lawyer becomes another opportunity for intelligence gathering, but that is exactly what this does. What is the value of having a lawyer when you cannot ask that person frankly and in confidence, ‘What should I do? I know this bit of information. Is it relevant or is it irrelevant? Please advise me?’ You are simply unable to do it in that circumstance. When you put those three things together and ask, ‘Are the safeguards adequate?’ clearly the answer is no, particularly when you realise that the people detained under this regime have fewer rights and less security than someone who is genuinely suspected of a criminal offence. So here you have information and you are in a worse position than someone who is actually a terrorist detained by the police with a reasonable suspicion that that person has committed an offence under the recent legislation.

They are my thoughts on the safeguards, but I would also like to suggest a more fundamental problem: that is, even if each of those issues were addressed and we did have what we might agree were adequate safeguards, that simply cannot justify a detention regime of this kind. Saying that the safeguards are adequate does not mean the outcome is acceptable. You can think of many examples where you might say it is a fair process. The safeguards are there but we simply would not countenance the outcome from that process. A good example, in a very different context, would be the death penalty. Personally, I do not think we could ever justify the death penalty just because we had what each of us would agree was a fair trial. Some things in terms of outcome cannot be justified irrespective of the process, and I think here the detention, for the first time as far as I am aware in Australian law, of Australians—not non-citizens, but Australians—for the purposes of gathering intelligence, without adequate procedural rights, simply cannot be justified, irrespective of the process.

The second issue I will talk about briefly is the constitutional issues, seeing they came up in some detail yesterday. I would have to say that this is a very difficult issue to address the committee on because of the complete lack of information, as far as I have seen it, about the justified basis of this legislation. The first thing to note is that there must be a basis. The High Court clearly decided in 1951 in the Communist Party case that this parliament cannot resituate itself into power by putting before the court a threat to the security of the nation. The parliament and the government must articulate a constitutional basis for its legislation; otherwise that is a clear reason why the legislation by itself would be unconstitutional.

The other thing is that I am far from satisfied that, if the ASIO Act were valid, this would be valid. This would fundamentally alter the nature of the ASIO Act. It would add a new character to the act. It may well change the nature of the organisation. There is no detention power there at the moment. With a detention power, you would have to say that entirely different constitutional issues arise. Of course the ASIO Act itself has never been tested in any detail in any event in the High Court for its own validity. I am not suggesting it is invalid, but I simply suggest that you cannot rely upon what is in the act and say that, therefore, this must be valid as well.

You could ask then: is the bill in its current form likely to be upheld in the High Court? I have approached that question along the lines that, if I was asked to advise on this as a barrister, what conclusion would I reach? The bottom line for me is that I do not think you could say with confidence that this legislation would be valid. I do not think you could say with confidence that it would be invalid either. It is in a grey area on a range of counts, and the best you could say is that, if this legislation went to the High Court, as I am sure it could do, you would end up with a fairly messy, lengthy fight, because it is not clear where it would stand.

In terms of analysing the constitutional issues, they fall into two categories. You obviously, firstly, have to have a head of power in the Constitution to justify the legislation. Personally, I do not think the external affairs power is likely to support the legislation. I am not aware of a relevant international treaty. I do not think links with other external events are likely to justify coercive powers of this kind. If the legislation is valid, it is likely to be primarily on the basis that it falls under the Defence power, but I think the committee should note that an attempt to justify the Communist Party legislation of 1950 under the Defence power failed. The High Court found that, even though Australia was then at the time of the decision engaged in a war in Korea, there was nothing that amounted to a war against communism that could justify legislation of that kind. In the context of Australia contemplating joining a war in Iraq, I think it is equally possible that the High Court would not find there is a war against terrorism of a sufficient magnitude that threatens the integrity of Australia that could justify legislation of this kind.

The only other thing I would note on the head of power point is that any arguments as to invalidity there would clearly disappear if, indeed, there is a referral of matters relating to terrorism to the Commonwealth parliament. So with that referral, that issue disappears. But even with the referral, there is still a secondary issue that cannot be removed by any referral—that is, whether it breaches some other limitation in the Constitution, firstly, relating to incompatibility having a judge perform an office or a function that is non-judicial that actually undermines integrity in the judges and, secondly, and of far more significance, I think there is a very real and quite powerful argument that detention in these circumstances breaches the separation of powers. The test clearly is: is this a legitimate, non-punitive example of detention? My own view is that it is not on the basis that there is no existing category of detention that matches anything quite like this, and that if it went before the High Court, there is a strong possibility that the High Court would react very strongly to the nature of the detention and declare it to be not a legitimate purpose to detain Australian citizens in these circumstances where they are not suspected of any criminal activity.

I will draw these issues together then. They are the two primary objections that I put before the committee at the moment. I think we do need legislation, but I do not think this bill is the right bill. The process also is of greater significance, and also suggesting underlying problems

with our constitutional system—the lack of a bill of rights and other issues—perhaps is the only explanation why this bill goes further even than the legislation in the United States or even Canada and the United Kingdom. In conclusion, the committee has forwarded to me the proposal by the four members of parliament, including the Hon. Kim Beazley, and I am happy to comment on that now that I have had a chance to look at that if that would be of any assistance to the committee.

CHAIR—Thank you very much, Professor Williams. Maybe you could start by offering a comment on that.

Prof. Williams—I have four points on the proposal that has been put before the committee in a submission. The first is that it removes any concern I had about a detention regime. Personally, I think a questioning regime is quite appropriate and necessary in addition to whatever powers the police officers have, so focusing on questioning strikes me as appropriate. I would compare it to the sort of questioning powers possessed by royal commissions, the Australian Securities and Investments Commission and other like bodies. I think this fits broadly within that category of an executive questioning power that could be seen as a reasonable balance between the threat we face and basic human rights. This is a more difficult one, but my own view is that in the circumstances it can be justified that someone questioned would not have a right to silence and that the right of self-incrimination would not extend beyond them to other persons. It is a matter of balance, but I do not have a problem with that.

The second point is that it addresses any concerns I have about children. Clearly, it would only apply to people 18 years or over. The third point is that it has a sunset clause. I might have chosen three years, but three or four years to me does not make much difference, so I cannot argue on that basis. The fourth point is that if I have real problems with it they relate only to process based things. Obviously, a lot more work would need to be done to develop this into a workable model. One problem, for example, is what the threshold is for questioning someone. Their model suggests that it should be someone who is ‘reasonably suspected of having information in relation to a terrorist act or organisation’. I would like a tougher threshold there to identify when it is appropriate to question people under this model. In fact, the bill before you has a higher threshold, and that might be appropriate to look at.

There is also a mention there, in terms of process, of enforceable protocols. I think that the protocols in large part should be in the act, not in regulations. In the same way that we now put extensive protocols in the Criminal Code, we recognise it ought not to be within the power of the executive to determine process relating to deprivation of liberty through questioning or in terms of videotaping or other things. So I think that would need to be fixed or looked at carefully. But, overall, I was very pleased to see it, because it met each of the principal problems I have had and, subject to ironing out those types of issues, I think it looks like the sort of balance that I think needs to be achieved in this area.

CHAIR—Before we go to other senators, I would like to follow up with a quick question. You point to the difference in the threshold between the proposal of the four as opposed to the bill. Can you explain to us what you see that difference as being and the effects of it?

Prof. Williams—The sort of threshold you have in the current bill is:

... that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence ...

The use of adjectives such as ‘substantially’ and ‘important’ are obviously harder to satisfy than the first point here that it should be simply someone who is ‘reasonably suspected of having information’. So I think putting words in there such as ‘substantially’ and ‘important’ is necessary because you could imagine that someone might have a very peripheral bit of information that is really not that important, but the fact is that they have it, and that could justify questioning under this regime. I think it needs to be a bit higher than that.

CHAIR—Thank you.

Senator PAYNE—Thank you very much, Professor Williams, for assisting the committee this afternoon and for your submission. One of the issues which you have raised both in your oral presentation and in your submission is the question of balance. I think it would be fair to paraphrase you as saying that the response should be proportionate to the challenge in many ways. You have seen this bill twice now—I think you gave evidence to the PJC as well. Is this an improved product to the first incarnation?

Prof. Williams—Yes, it is improved, but unfortunately it is still—and I used the term at the time—‘rotten at the core’. The basic problem is that it provides for detention of Australian citizens where there is no suggestion that they have actually done anything wrong. We have never done that in this country, and that comes to my fundamental objection that you can put whatever safeguards you like in place but I do not think we should ever justify that type of regime in this country. You can think of the possibilities for abuse that might follow. I am talking not necessarily about now but about perhaps in 10, 20 or 50 years time, particularly without a sunset clause. So, yes, it is better, but unfortunately in my view it is still quite unacceptable.

Senator PAYNE—You said that you were concerned that one of the effects of going down this legislative path might be to change the very nature of ASIO as an organisation. Do you therefore have some concerns that the powers which are provided in this legislation might be extended past the offence of terrorism?

Prof. Williams—That is a possibility, and I would have to recognise that in the amendments a lot of care has been taken to establish, for example, that police are involved to a higher degree than was initially apparent. My initial objection was that it appeared that ASIO was basically running most of the process, whereas it is now somewhat clearer that some of the vital functions will be undertaken by police, such as the arrest of a person and other things. My objection on that ground is weaker than it was, but I still have the problem that ASIO in some way is connected with a detention regime through questioning or otherwise. In a context where you do not necessarily have access to legal advice for some periods, I think there will be a risk of community confidence being affected in ASIO—look at recent raids and the scrutiny that the community had applied to those. If there is a suggestion that the powers are being misused in circumstances where there are some questions about whether the powers ought to be given in the first place, then you potentially damage the reputation of the law enforcement or intelligence bodies involved in that process. If nothing else, people may well become more fearful and less trusting of an organisation that has a power of this kind that can be applied to them without them having done anything wrong.

Senator PAYNE—I have some questions in relation to the impact of the legislation on children—concerns which have been expressed broadly, and some of which I identify with. One of the responses that the department and ASIO provided to us yesterday in answers to questions along similar lines was that it is obvious on an international basis that there have been perpetrators of heinous acts of terrorism who were as young as 15, 16 and 17 years of age. In terms of the nature of the offence, there is an association there which they regard as relevant for this legislation. They have chosen the age of 14 because it is the age of criminal responsibility in this country under our criminal legislation and that is why the act applies on that basis. Do you have any comment to make on that?

Prof. Williams—I do. If there is a child who is suspected of having been involved in criminal activity, that person should be subject to the normal law enforcement powers that would apply to that type of person. My difficulty with this regime is that it can apply to children who do not fit into that category. If you tailored it quite specifically to terrorist suspects, it may well be appropriate to look at something more.

Senator PAYNE—I thought that that was what the amended act did in relation to 14 to 18 year olds—that a warrant may be issued only if the minister is satisfied that the person is at least 14 and is likely to commit, is committing or has committed a terrorism offence. So there is a degree of criminal suspicion.

Prof. Williams—That is correct, but in terms of the amendments, it has been much more tailored to children in those circumstances. I do not have a problem with some kind of detention regime applying solely to terrorist suspects. Indeed, that may well apply to people under 18 years of age. But I find it hard to justify that type of provision in a bill of the kind we have here. That is because the bill obviously does much more than that.

Senator PAYNE—So you are drawing the line between terrorist suspects and people with information about terrorism?

Prof. Williams—Yes, quite significantly, and that is exactly what happens in the United Kingdom, Canada, the United States and other jurisdictions. If there is evidence to suggest a person is a suspect, I think there are reasons that can justify stronger treatment for that type of person.

Senator PAYNE—I am not sure whether you picked it up on the very useful webcast process yesterday, but the point the department and ASIO made in response to that—it was an initial question from the chair—was that the reason this legislation is presented differently from some of the overseas examples which we have all discussed is that they contrast legislation based on law enforcement in those jurisdictions with this legislation which is based essentially on intelligence gathering. Therefore, we have established a different regime and provided a different context and environment in which agencies can work.

Prof. Williams—It is very awkward the way it is caught between those two things because on the one hand, yes, the legislation identifies children who could be picked up through the normal law enforcement process and would be entitled to all of the rights of law enforcement—and so they should be—including access to lawyers, limitations on detention of up to eight hours and a range of things.

Senator PAYNE—But the point ASIO made is that they would not be able to access that process and it is important for them—presenting their case as best I can—to be able to access that process to gather the intelligence they may need.

Prof. Williams—Yes, and therefore, at least in my own view, perhaps a more appropriate way is to have a questioning regime which is primarily focused on law enforcement while ensuring that ASIO has access to any information coming out of that system. Having a questioning regime which picks up potential suspects cannot be justified where it treats those suspects in a way that denies them basic legal rights. Also, I am concerned that in a way that makes anything collected through that inadmissible. I think we ought to have a tough regime directed at suspects that provides admissible information. ASIO ought to have access to anything out of that that can be used for intelligence purposes, but in the end you may well prejudice a trial and the people may well not be successfully prosecuted as a result.

Senator PAYNE—We discussed that issue this afternoon as well. I have a couple of questions on your submission. In the context of your first reason, you raise the question of misuse of intelligence information to gain criminal convictions. Is this a scenario you envisage playing out in Australia? I know you are using a US example.

Prof. Williams—It is a possibility. One of the very hard things I find in analysing this legislation is that it is quite difficult to know how it is going to work in practise. Whether or not there is a real possibility of that occurring may depend upon the way the protocols or other relationships between organisations operate. You would have to say that at some point in the future there is a possibility that information collected may be inappropriately supplied to other organisations and where information is collected through coercive means such as this, with heavy penalties for noncompliance, there is at the very least a potential for abuse of those types of powers.

Senator PAYNE—Are there protections that could be built into the legislation to avoid the sorts of potential abuses you are talking about?

Prof. Williams—It is pretty difficult. The reason it is difficult is that once somebody is picked up—say the most severe category of someone who may well be denied access to a lawyer—the full force of different agencies is put on that person, including the possibility of a lengthy jail sentence, and it is hard to imagine how you could balance that up and prevent that information being leaked or distributed in other ways that would be inappropriate. Again, it is less the problem for safeguard and more a problem of whether this regime is justifiable in the first place, given the departure it amounts to from accepted ways of collecting information.

Senator PAYNE—One of the issues you raise in your submission specifically is about the accountability of an organisation like ASIO and the scrutiny it receives. In response to some questions yesterday, both the department and ASIO were at great pains to give comprehensive answers when talking about the Office of the Inspector-General of Intelligence and Security and the role it plays, virtually with the powers, as they described it, of a standing royal commission—that it can hear complaints from individuals, that the Inspector-General can inquire into matters referred by government and conduct own-motion inquiries as well, and that that is a very comprehensive accountability and scrutiny process. Do you have a view about whether that affects this legislation or is it helpful for this legislation?

Prof. Williams—It is of direct relevance to the legislation. With the powers that ASIO has at the moment, it is a very important, significant regime, but I do not think it would be adequate if these types of initiating or other powers were given to ASIO. The reason it is inadequate is that that regime largely depends on the personality of the person holding that office. If an inappropriate appointment to that office were made some time down the track, in the end your only level of scrutiny is an executive scrutiny which is subject obviously to appointment or whatever of that person and you lack any of the accountability mechanisms of a public kind that you would normally find for police forces, police integrity commissions or other bodies. If the powers go beyond the current powers, then you would have to look at opening up that scrutiny process. Personally, I do not think that that would be suitable for ASIO.

Senator PAYNE—Speculation on the nature of personality and individuals in relation to appointments could take us from here to the end of never, but it relates to virtually every public sector appointment at the end of the day. So I am not sure about whether that works here.

Prof. Williams—It is the personality of a person who is an executive officer only.

Senator PAYNE—I understand that. But in this legislation, the Inspector-General is intimately linked into the process in terms of the individual, before every period of detention, being briefed and told that they would have access to the Inspector-General and so on. The effort to knit, if you like, the Inspector-General of Intelligence and Security into that is, I think, an effort to address the scrutiny concerns that have been raised.

Prof. Williams—Yes, and you would have to recognise that they are very important and they go a long way. But, if a body like ASIO is given powers that relate to detention of Australian citizens where there is no suspicion of criminal activity, I do not think it is enough. When you are dealing with an abrogation of liberty of that magnitude that could affect any Australian who, in fact, is not involved in terrorism, I think a non-public process is not sufficient for reasons of confidence in the body and also for reasons of providing a broader mechanism of accountability.

Senator KIRK—Professor Williams, thank you for your very useful submission, which I have read in detail. I will direct my questions more to the proposal that has been submitted in a private capacity by Senator Faulkner and Co. and ask what your view is on a number of the issues raised in that. From your submission, it seems that your main concern with this bill is that it involves detention of non-suspects in secret for the purposes of questioning. The submission by Senator Faulkner and Co. suggests that, if the regime were just a questioning process, it would not be as problematic. I think that is also what you suggested. How would a questioning regime really differ from the existing detention regime? Would it just come down to the time during which you are questioned? Effectively, that would be detention. Could you elaborate on that?

Prof. Williams—That is a good question because it raises this issue: what is the fundamental difference between questioning and detention? To my mind, there is a difference. I look at it like this: if I am called before a royal commission to give evidence and I am subpoenaed and required to sit in the dock and then answer questions, I do not think Australians would regard me as being detained at that point. Yes, I must be there; I am compelled to be there to answer questions in the same way as if other bodies required me to attend to answer questions. There is a sort of non-custodial detention that requires my participation and presence, but it is not a detention regime, particularly when you add in full rights to lawyers and all sorts of things. At

no point is it actually suggested that you are deprived of your liberty in a more fundamental way than simply it being incidental or necessary to answer questions. But I could change my mind. If it turned out under this particular proposal that you could be subjected to questioning for seven days, I would say you had a detention regime. It is a matter of form and substance. But if it is for limited, carefully controlled times of questioning with appropriate access to lawyers and extends no more than, say, a period of some hours each day, that to me would be questioning and would not strike the same sort of detention problems—and I do not think the High Court would see it as being detention either in those circumstances.

Senator KIRK—What sorts of limitations would you have in place with the questioning? Would that only be able to take place for, say, four hours? Would it have to be in a public place? It has been suggested to us that the questioning would take place in the chambers of the prescribed authority. There would not be any public access then; it would not be an open process. Would it still strike you as being secretive and, therefore, being more along the lines of detention rather than just questioning?

Prof. Williams—It would certainly be secretive but, again, it is a matter of a balance. I think it can be justified that it is secretive, given the national security and other issues involved. The key point is that there is a requirement to attend for questioning, that questioning must be carefully limited in the act to a maximum period and there must be other safeguards to make sure it does not extend beyond that. Subject to that, I think it could occur in what might be called secret—even if it is in a public office, so long as that office is closed. I think also having access to the lawyer of your choice, subject to that person being disqualified, is an appropriate balance. I can well imagine for this type of proposal that, if you were to take what might be regarded as a fairly strict or pure civil libertarian view, there are a number of things you could object to here—loss of the right to silence, even being compelled to answer questions. But my view is that there is a balance. I start with the view that we do need laws that actually are stronger in some respects than existing laws. Even though there are things here that are on the borderline, I think this falls on the right side of that line in being directed to questioning, so long as it is drafted in that way.

Senator KIRK—And would you say it should be for a maximum period of, say, eight hours, subject to extension? How would that work?

Prof. Williams—This is where I run into some difficulties, because I do not pretend to have any operational experience in these matters. Personally, I would want to know what might be regarded as a reasonable period for questioning. At the same time, I would like to hear from people who have experience of these types of regimes to indicate when questioning goes beyond what might be regarded as fair and reasonable, balanced against the interests of the person being questioned. My starting point would be that the existing Criminal Code provides for a four-hour questioning period, extendable to eight hours. I think there would need to be a very strong reason to extend it beyond eight hours in any one day. Certainly, a person should not be detained beyond the period of questioning.

Senator KIRK—You have raised some of the constitutional questions that might arise with the issue of a warrant by, say, a federal magistrate or a federal judge under the proposed regime. Would you see the same sorts of difficulties arising if a federal magistrate or federal judge were to be asked to be involved in this so-called questioning regime?

Prof. Williams—The issue would certainly arise, but I think it is far less likely to cause a constitutional problem. That is because the test that the High Court would use is twofold. Firstly, is this a non-judicial power? It clearly is. Issuing a warrant in any circumstances for the executive is a non-judicial power. The second real question is: in exercising that non-judicial power, does this bring the judiciary into disrepute, does it undermine public confidence, does it affect the integrity of the judges? It is one thing to say that judges can issue warrants for detention of up to a week for people not suspected of any offence. I think that may bring judges into disrepute. You can look at decisions such as the Cable decision in New South Wales involving detention and equivalent problems. On the other hand, asking judges to simply authorise questioning not involving detention except where it is incidental to questioning is far less likely to be a problem and is more likely to be acceptable along the lines of phone tapping and the Grollo case. But there is a balance there, and there is always a risk that the High Court will overturn the original telephone tapping cases. There has been a lot of criticism of them, so there is an issue. But I think it is far less likely to be problematic with this scenario.

Senator KIRK—Do you think the use of retired judges under both regimes that we are discussing would overcome the constitutional issues that you have raised in relation to Grollo and the like? Could that be a proposal even under this proposed legislation—to replace federal magistrates and federal judges with retired judges?

Prof. Williams—Subject to the logistics of finding enough retired judges. It would clearly be a sensible thing in general, whenever a warrant based system is being contemplated, to give that power to retired or non-sitting judges as opposed to any current judicial officer. If you give it to someone who is a retired judge, you get the integrity and the experience but you remove any of the constitutional impediments.

Senator KIRK—The private submission from Senator Faulkner and Co. suggests that the questioning actually take place by the Federal Police. Would you consider that to be an improvement over, say, the questioning by ASIO that is in the proposal before us?

Prof. Williams—It strikes me as a sensible thing to do, because I think one of the advantages of this system is that you are more likely to get admissible evidence that can be used in a court. The police are the ones who are experienced in questioning witnesses and people in a way that leads to evidence that is reliable and that can be used in court. To give it to ASIO officers, or indeed any member of the executive, who do not have the experience in gaining that type of information may simply render it useless in the court context. I fully understand that there is a primary intelligence gathering aspect to this but, personally, I would be more comfortable with the police doing it, in conformity with existing protocols and practices, than I would with giving it to another body where there might be a potential for things to go wrong.

CHAIR—Perhaps I can interpose here. What about a situation where the police may be in charge of the questioning but ASIO officers have a capacity to engage in it?

Prof. Williams—I do not think I would have a problem with that. There has to be some play in some of these issues. In the end, the questioning should primarily be conducted by the police. It should be conducted according to standards set out in the legislation that are similar to those in the Criminal Code. There should be other protocols that supplement that. It is clear that in certain circumstances ASIO officers are entitled to be there, and I do not think there should be a problem if they happen to ask a question or assist in some way. Of course, it should be

videotaped in case issues arise—such as somebody extending beyond what can be done legitimately or someone being treated inappropriately—as there may be prosecutions or a range of responses. Plus you have your lawyer there anyway and, if such things happen, you have someone who can respond appropriately.

CHAIR—On that point, you say ASIO officers can participate to a certain extent, but are you trying to tell us that the main framework should be the one that applies under Federal Police protocols at the moment?

Prof. Williams—What I suggest is that we should look to those protocols and any departure from those should be fully justified. It may well be that there are particular areas in which things need to be done differently. I am not an expert in the operation of those protocols, but I take that as a base line and would require a justification to depart from that.

Senator STEPHENS—I am not a legal person and, in considering this legislation and the proposed amendments, I am trying not to consider this legislation in isolation but in terms of the other things that are going on. We have had several submissions which mention the fact that the proposed Australian Crime Commission Establishment Bill is relevant to this committee's deliberations. It is proposed that that would provide police with unprecedented new powers. I wonder if you have had a chance to consider the implications of that piece of legislation with the one before the committee.

Prof. Williams—Unfortunately, the short answer is no. I have had a quick look through that legislation but have not had the opportunity to do so in sufficient detail to know, for example, how it would fit in with this. Someone who may be able to help you with that is Dr Greg Carne, who I understand is appearing before the committee in a couple of days. I know he is interested in that issue.

Senator KIRK—My question is in relation to evidence given earlier today, which you may have heard. I asked ASIO and A-G's about the circumstances of the first 48 hours of detention. As you know, some people may not have a lawyer present. I asked some questions about what would occur in circumstances where somebody said that they wish to make an application to the Federal Court. The answer seemed to be that that could well be excluded under the terms of the warrant that was issued by the judge authorised by the Attorney-General. I had some concerns, as did the chair, about the constitutionality of that. I know it is not something which is contained in your submission, but do you have a view on that?

Prof. Williams—To answer it fully, we will have to wait for the result in the currently reserved High Court case on access to judicial review and privative clauses. This may well be an example of that, but I cannot imagine that it is likely that any regime that explicitly denied someone the capacity for judicial review in circumstances like this could be valid. It may well be read down. The Constitution says in section 75(v) that you can bring certain types of legal actions against officers of the Commonwealth. Clearly, we are dealing with officers of the Commonwealth in these circumstances. If the scenario you are putting to me actually did arise, then it sounds like there would be quite a direct constitutional problem. Apart from that, you have the underlying issue—another problem I have with the legislation: how can you ever file a judicial review writ? At best, you rely upon some third party to do so on your behalf, assuming of course that they even know you have been detained. You end up being detained in

circumstances where, through a warrant that effectively denies you that capacity, you lose all legal rights without any effective recourse to a judicial person.

Senator KIRK—Also, there is no access to a lawyer who can advise you of your rights in that way either. There might be a constitutional issue here, and this is something that we should take forward.

Prof. Williams—There is a range of issues and I focused on the main ones. There is a range of problems that could arise under this legislation. It means that, if it was enacted in its current form, I think it would be reasonable to expect that there would be a series of constitutional arguments that you could make in the High Court. Some would be standard, as I have already put; some that you have put may be speculative; several may well be creative. This is the type of legislation that you could imagine the High Court would react to very strongly because of its departure from established fundamental legal protections that have existed in our system for 100 years and under the common law for far longer. It may well be that, even if there is not a current argument that I can think of, the High Court may find that there are other basic principles that this infringes.

Senator KIRK—Some of those problems would be overcome, wouldn't they, by ensuring that there is always a lawyer present—in other words, that you could not have the possibility of 48 hours without a lawyer there to assist you?

Prof. Williams—That would be important, but having your conversation listened to with your lawyer actually pretty much undermines the value of having a lawyer, particularly if it is a lawyer you do not even know. You could imagine: somebody walks in whom you have never seen before and you do not know whether they are an ASIO officer, some other Commonwealth officer, someone who has been given a security clearance as part of the Commonwealth process or someone else. They walk in, you know that ASIO is listening to the conversation and you attempt to get some frank legal advice. It strikes me as very unreal to even contemplate that that could work. In the end I think the more apt description is that your access to legal advice, at least after the first 48 hours, is really another opportunity for intelligence gathering. In the end it is not an opportunity for free and frank legal advice—it is simply a way of getting more information.

Senator KIRK—What is your view, then, about the suggestion that has been made about having a panel of lawyers—nominated, say, by law councils—who are security cleared, being able to be drawn upon or chosen for you? From what you have just said, I can see that you may have some difficulties with that.

Prof. Williams—I do have some difficulties because I think that in a circumstance where somebody is detained under pressure, under stress, there are real reasons—unless a sufficient objection should be given—why they should have access to a person they trust, a lawyer they have established a relationship with, and not to expect that person to have an effective relationship with someone whom they have never seen before, whom effectively has been nominated by government related process. If it was me and I did not have any legal training, I would be incredibly sceptical and worried about that. I would wonder: is this person on my side or not? The onus should be that the person gets the lawyer whom they want unless it can be shown that that person is inappropriate, and the threshold should be fairly low for that. I do not think it should be a particularly onerous process. It might be if there are reasonable grounds for

believing the lawyer is a security risk or whatever, so that it can be done very quickly. But there should at least be some initial requirement that the person can have the lawyer of their choice.

CHAIR—You mentioned the question of potentially inadmissible evidence being collected. Would you like to elaborate on that? In what circumstances can you anticipate that some of the evidence may turn out to be inadmissible in subsequent proceedings?

Prof. Williams—I would start with saying I am not a criminal lawyer, but from what I do know, having looked at some of these matters, there are a range of tests relating to the reliability of the evidence. The High Court has developed a range of warnings and protections that relate, for example, to people being verbally by the police. That has led to a lot of protections being put in the legislation to make sure that confessions and other matters are received in appropriate circumstances. If you take all those protections away, you run the possibility of the full gamut of High Court decisions that have established that evidence can be non-reliable when it is collected in circumstances where there is an incredible differential of power between the person being questioned and the law enforcement or intelligence authorities and also where that person may well argue they have been subject to duress. If you cannot tell whether that is true or not, there are quite severe questions as to reliability. Often a lawyer needs to be present because that is the way that will satisfy a court that the evidence collected through that process can be admitted in any prosecution.

CHAIR—I suppose there is a very fine line between what is intelligence and what is evidence in these circumstances.

Prof. Williams—There is, and I can understand and respect the objective behind this bill of gathering intelligence, but I also start from the proposition that we want to gain the evidence that enables these people to be tried and jailed for lengthy periods. A process that may well compromise that needs to be considered very carefully. I think also that if we collect intelligence in a way that undermines some existing protections and values we have in the law that are the rights of every Australian, then we really need to ask: is this an appropriate and balanced system? By all international standards, I believe it is not.

CHAIR—Going on to the constitutional aspects of this legislation, do you foresee any potential problem arising from any express or implied freedoms in the constitution?

Prof. Williams—There are a few. You have the implied freedom of not being detained by the executive unless it relates to something like mental illness, or other well-known exceptions. As I suggested earlier, this is the sort of area where you could imagine that a creative lawyer may well have in mind some other as yet unthought of implied freedoms. Courts have a way of reacting to extreme fact scenarios that depart from established rights in a way that often ends up giving those types of protections, and a well crafted case could well go down that track. You have a range of things that could come, but mostly they relate to interference with the judicial process and parliament and the executive going too far in taking powers to itself that up until this point we would accept can only be exercised by judges.

CHAIR—Do you anticipate that the potentially enabling powers—the defence power, for instance—can wax and wane according to both international and domestic aspects, including terrorism?

Prof. Williams—That is right. We need to ask ourselves what the current defence risk to Australia is. That is really going to be the key question in any High Court case in the first series of constitutional questions. In answering that question, I look to the most important parallel: I look to the Communist Party case of 1951. Australia was at war with Korea at that point, and the High Court said that we were not in a state of war; they described it as what might be termed a state of relative peace. This was a clear statement from the High Court that you cannot have draconian laws in circumstances where there is not an explicit defence threat to Australia beyond something that might be regarded as subversive or asymmetrical, as this is.

CHAIR—You mentioned the incidental power earlier on. In respect of the security legislation and the terrorism act, we had the primary offences, the secondary offences and some reliance on the incidental power. Can a compulsion to answer questions provision be seen to be incidental to those sorts of primary and secondary offences?

Prof. Williams—Certainly some things could be regarded as incidental. Again, it is a line-drawing exercise. I think that a questioning regime would be regarded as incidental. For example, at the moment the detention of criminal suspects for questioning is clearly something that the judges would find to be acceptable. I think something that goes a little beyond that and the sort of regime that is being proposed by the four members of parliament would also be likely to be regarded as incidental. To not regard it as so would mean that the court took an incredibly low estimate of the sort of threat facing Australia. I think they will find that there is a threat; it is just not as demonstrable as could justify the bill in its current form.

CHAIR—Right.

Senator SCULLION—Thank you again for appearing today. It has been very useful to me. It is a very comprehensive submission. In some of your last statements, you draw a simile between Australia's position in terms of the declaration of war in Korea, the declaration of war on communism, and the declaration of war on terrorism. It is a similar sort of event. Would you agree that the threat to Australia would reasonably be perceived to be far greater today than it was in those circumstances?

Prof. Williams—No, I do not think the threat would be regarded as more significant than it was in the early 1950s. I say that having actually completed some research on exactly this question some time ago. I looked at what was in the newspapers and what the climate was at the time. At the time the High Court decided the Communist Party case, Prime Minister Menzies was quoted across newspapers as saying that World War III was imminent. He said that the threat facing Australia was as dire as any threat this country had faced since the Second World War and that the red peril, as it was then described, would be something that could threaten the very life and existence of this nation. I do not think we can fully appreciate just how dire that threat was seen to be. From my reading of that material, the threat then was at least as significant in the public's perception as the threat today.

Senator SCULLION—I suppose I would go to the difference in the nature of the threat. Although I have nowhere near the depth of knowledge of the initial situation that you describe, certainly the threat then would appear to be what we can loosely call a conventional threat. They were having a war; they had an army, we had an army and we thought we were going to be invaded. Now we are talking about our capacity to thwart those issues through intelligence gathering and the capacity for Australia to be under attack in a way that is not conventional. I

suppose the public perceptions may be the same, but would you concede that the issues facing us now are substantially different? Perhaps the threat is not larger but the issues are substantially different.

Prof. Williams—It is a good question. The interesting thing about the Communist Party legislation of 1950 was that it did not respond to the external threat but—in very similar circumstances to today—targeted internal subversion and current threats from members of the Communist Party, fellow travellers and other related organisations. The fear was that, through internal activities, that would actually give rise to violence, loss of life and other problems. In fact, that legislation, as struck down, was directed at a more similar problem to what we have today than actually being related to something like the Korean War. The parallels are quite striking between the issue then and the issue today. It is a matter of common sense and judgment, but remember that the High Court takes no evidence on this; it simply forms its own judgment—and that is a real problem. What we know is as relevant as what the High Court would know. The High Court would say, ‘Given our decision back then, do we think that the threat facing Australia is more significant?’ Personally, I think it is hard today to say that the war against terrorism would be regarded by the High Court as a higher level threat than the war against communism was back then.

Senator SCULLION—You have mentioned that you do not have an operational knowledge—so we share the same level. You said that you thought it more appropriate for the police to be doing the questioning and that it would seem more proper, if you like, for them to be doing that. With no knowledge of the issue, I would have made an assumption that the nature of gathering, on the face of it, evidence for intelligence would appear in a number of ways to be substantively different from gathering evidence necessarily to secure a prosecution. If we accepted that we have police do this questioning, in view of the experiences that seem vastly different because they have different organisations for different things, do you think that that would downgrade our capacity to eke out the right sort of intelligence from responses?

Prof. Williams—I do not think so, and my reason for that is that the proposal, sensibly, has a key role for ASIO in the questioning. That is also why I would not say that ASIO should be denied from asking questions that they think are relevant. In terms of the protections and the people with real experience in dealing with these types of questioning regimes, it ought to be given to people with the experience in doing so. The only way I would agree with that concern is if we thought that ASIO and the police could not work together on these issues—and I would like to think they can. If you look at the recent raids around Australia, the public reports, at least, suggest that in some cases both the Federal Police and ASIO officers were present on those raids, and obviously intelligence gathering was a key issue there. I am not sure why it would be materially different—that they would cooperate through different types of questioning through a regime that has established protections built in with the people who are experienced with those protections.

Senator SCULLION—As I understand it, perhaps the difference between the operational aspects of the raids that took place was that the Federal Police, or the non-ASIO jurisdictions, were actually responsible for the actual raids, and detention if that was going to be the case; whereas ASIO were to be responsible simply for the questioning aspect of it. I understand that was to be the intent. Whilst I can understand the analogy between it being okay in an operational sense—that is, ‘You get the door and I’ll get this and the bits’—and I can understand parallels in an operational sense, in the questioning sense, I would have thought that

the experience you would have to have in terms of intelligence gathering would have been substantially different.

Prof. Williams—One easy way of dealing with that is to ensure that members of the Federal Police have adequate training or perhaps even have experience in working in bodies like ASIO so that if these issues arise you have a police officer there with the training and the skills to do it. Protocols and protections need to be put in place between the organisations. I think you are raising an important point, but I think there is an operational answer to it—or at the very least there would need to be really cogent reasons why there is not an operational answer. Given that we have seen it operate in another context, I am not sure why that would not be true.

CHAIR—On that note, Professor Williams, thanks very much for coming here today and for being so helpful and cooperative.

Evidence was then taken in camera—

Committee adjourned at 5.34 p.m.